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SUPREME COURT OF THE UNITED STATES

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Sup. Ct.

OCTOBER TERM, 1947

No. 696

BENJAMIN GUINNESS,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

The above-named petitioner prays that a writ of certiorari issue to review the judgment (R. 53) of the Court of Claims of the United States entered in this cause on December 1, 1947.

Statement

This is an action against the United States to recover an alleged overpayment of federal income taxes for the calendar year 1930. The only remaining issue, to which this petition is directed, relates to the proper treatment for federal income tax purposes of a transaction whereby the partnership of Ladenburg, Thalmann & Company, of which the petitioner was a partner, sold 150,000 shares of stock of Standard Power & Light Corporation.

The petitioner, at all times material herein, was an individual subject of Great Britain, residing in France.

During the calendar year 1929, and for several years prior thereto, he was a partner of Ladenburg, Thalmann & Company, a partnership with its principal office at 25 Broad Street, New York City. His withdrawal as a partner became effective as of December 31, 1929 (R. 22-23).

Ladenburg, Thalmann & Company was in the investment banking business. The partnership had acquired control of 165,000 shares of Standard Power & Light Corporation stock. H. M. Byllesby & Co., also in the investment banking business, owned a similar amount of the stock. By reason of the ownership of this stock, the two investment bankers were able to control the placing of the securities of a large number of public utilities which were owned or controlled by Standard Power & Light Corporation and its subsidiaries (R. 34-35). In order to maintain this control, the stock was placed in escrow with restrictions governing its sale (R. 27).

In the course of the financing of these utilities, there were certain transactions as a result of which the Byllesby interests were threatened by a suit on the part of minority interests. The reorganization of the corporate structure of these companies, which was contemplated in the agreement of December 21, 1929, was designed to eliminate that threat (R. 27; R. 52).

In order to isolate the ownership of the Standard Power & Light Corporation stock from the incidents of changes in the partnership interests, the stock was caused to be transferred to Standard Utilities Corporation, all the stock of which was in turn owned by the partnership (R. 27). Therefore, during the negotiations proceeding the agreement of December 21, 1929, Ladenburg, Thalmann & Company owned all the stock of Standard Utilities Corporation and that corporation, in turn, owned the 165,000 shares of Standard Power & Light Corporation stock which had been acquired by the partnership (R. 28-29).

The stock was registered in a street name and endorsed in blank with stock transfer powers attached (R. 31). It had been deposited with the Chemical Bank & Trust Company, or its predecessor, in escrow (R. 27). The ownership of the stock by Standard Utilities Corporation had never been disclosed. For all practical purposes, the only record thereof was represented by the respective entries on the books of Standard Utilities Corporation and of the partnership (R. 51-52).

As a result of the desire of the Byllesby interests to acquire the Standard Power & Light Corporation stock, there was presented to the partnership an opportunity to sell this stock at a large profit. However, if the stock were sold by Standard Utilities Corporation, that corporation would realize a substantial gain on the sale. This gain would be in turn taxed again when distributed to the partnership. It was planned to distribute 150,000 shares of the stock as a dividend in the event that the sale was to be consummated.

An elaborate agreement, dated December 21, 1929, was entered into whereby the partnership bound itself, upon the fulfillment of certain conditions, to make a sale of the stock for a consideration of $25,000,000.00, represented in part by cash and in part by notes of the purchaser to be secured by the stock as collateral. The stock was to be sold to United States Electric Power Corporation. The conditions involved the adoption of certain amendments to the certificate of Standard Power & Light Corporation and the approval thereof by the other stockholders (R. 27-28).

The partnership did not disclose that the stock was then held by Standard Utilities Corporation. Due to the fact that the partnership owned all the stock of that corporation, the partnership was assured of being in a position to deliver the stock in the event that the sale should be consummated. As will appear from paragraph (7) of the

Special Findings of Fact of the Court of Claims—which is strictly in accord with the stipulation of facts—the partnership unqualifiedly agreed to sell the stock upon the fulfillment of the requisite conditions (R. 27-28). Thus, the partnership did not enter into the agreement as agent of Standard Utilities Corporation.

The parties to the agreement of December 21, 1929, convened at Dover, Delaware, on January 7, 1930, for the purpose of completing the sale. A representative of the depositary was present with the stock certificates and the agreed purchase price represented by a check for $10,000,000.00 and $15,000,000.00 in notes of the purchaser. The transfer agent was likewise present in order to record the transfer of the stock on the records of Standard Power & Light Corporation. Most of the preliminary conditions for the sale were completed that morning. The partnership was thereupon reasonably assured that the transaction would be consummated (R. 31).

On the afternoon of January 7, at a duly convened meeting of the Board of Directors of Standard Utilities Corporation, the following resolutions were adopted:

> "RESOLVED, that Ladenburg, Thalmann & Co., for and on behalf of Standard Utilities Corporation, and without the necessity of disclosing Standard Utilities Corporation as the principal for whom they are acting be and they hereby are authorized on behalf of Standard Utilities Corporation, to negotiate and consummate a sale of Fifteen Thousand (15,000) shares of Common Stock of Standard Power and Light Corporation at the price of One Hundred Fifty Dollars ($150) per share and to cause certificates therefor to be delivered to the purchaser thereof and, upon receipt of the purchase price therefor in cash, to hold the same to the credit of this corporation and subject to the order of its officers;
>
> "RESOLVED, that One Hundred Fifty Thousand (150,000) shares of Common Stock of Standard Power

and Light Corporation be and they hereby are declared to be paid as a dividend upon all the outstanding shares of stock of this Corporation of each class, share and share alike, payable immediately to the holders of record therof."

A "ticket" constituting a bill of sale was delivered to the partnership and 150,000 shares of the stock were transferred on the respective records of Standard Utilities Corporation and the partnership. Since the stock was registered in a street name and endorsed in blank, this effectuated a complete change in ownership. The representative of the partnership at Dover was advised of this action (R. 32-33).

At a meeting held simultaneously, the Board of Directors of Standard Gas & Electric Company approved the prior proceedings of its stockholders and the amendment to the certificate of incorporation of Standard Power & Light Corporation (R. 31). All the conditions for the sale were thereupon fulfilled, with the exception of the filing of the amendment with the Secretary of State of Delaware. Prior to such filing, however, the agreement was still executory.

Thereafter, on the same date, the amendment was filed with the Secretary of State of Delaware. At the direction of the representative of the partnership, the stock was transferred by the transfer agent to the purchaser and the check and notes were delivered to the partnership. Of the total cash received, $2,250,000 was credited to the account of Standard Utilities Corporation in payment for 15,000 shares and the balance of the cash and the notes were retained by the partnership in payment for 150,000 shares (R. 33).

In filing his Federal income tax return for the year 1930, the petitioner reported as a dividend the amount of $4,746,-441.57, representing the value of his interest in the distribution of the 150,000 shares of stock by Standard Utilities

Corporation (R. 34). This was, of course, prior to the decision of this Court in *General Utilities & Operating Company* v. *Helvering*, 296 U. S. 200. The petitioner assumed that the entire value of the distribution was taxable as an ordinary dividend. It subsequently developed that the distribution exceeded the accumulated earnings and profits of Standard Utilities Corporation.

On December 12, 1932, the petitioner filed the first claim for refund. The basis of that claim was that the distribution was taxable as a capital gain to the extent that it exceeded the accumulated earnings and profits of Standard Utilities Corporation plus the cost or basis of the petitioner's stock of that corporation. After a thorough investigation of that claim, the Commissioner of Internal Revenue agreed with the petitioner's contention. However, the Commissioner asserted certain other adjustments as offsets to the claim whereby the amount refundable was reduced to $19,611.28. That amount, with interest, was duly refunded to the petitioner (R. 37).

On August 14, 1933, the petitioner filed a second claim for refund in which he contended that the adjustments made by the Commissioner of Internal Revenue, as offsets to the first claim, were erroneous. Upon a consideration of the second claim, the Commissioner reversed his position with respect to the distribution and sale of the Standard Power & Light Corporation stock. The claim was duly rejected on that amount, R. 38-39). This action was thereupon brought in the Court of Claims.

The case was decided by the Court of Claims on July 7, 1947 (R. 22). Entry of judgment was suspended for a report from a Commissioner of the Court of Claims (R. 40). A motion for new trial was overruled on October 8, 1947 (R. 52). A Supplemental Stipulation was thereupon filed, pursuant to which it was agreed that a recomputation of

the petitioner's federal income tax liability for the calendar year 1930, on the basis of the decision, resulted in a deficiency in federal income taxes due from the petitioner in the amount of $6,511.50. Judgment was entered in accordance with the stipulation on December 1, 1947 (R. 52-53). A second motion for new trial was overruled on March 1, 1948 (R. 53).

The amounts necessary to determine the earnings and profits of Standard Utilities Corporation available for distribution as a taxable dividend under any theory of the case, the petitioner's basis for the stock of that corporation, and the value of the stock of Standard Power & Light Corporation at the time of the distribution, are all set forth in the findings of the Court of Claims (R. 33). The value of the 150,000 shares of the Standard Power & Light stock, distributed and sold on January 7, 1930, was $21,850,000.00.[1] The earnings and profits of Standard Utilities Corporation accumulated after February 28, 1913, exclusive of the transactions involving the Standard Power & Light stock, amounted to only $4,361,964.25 (R. 34). In the decision of the Court of Claims, a *quorum* of that court could not agree on any theory for holding that any distribution in excess of that amount was taxable as an ordinary dividend within the meaning of section 115(a) of the Revenue Act of 1928.

The opinion of Judge Madden, with Judge Jones concurring, held that the transaction must be treated as if the 150,000 shares of dividend stock had been sold for the account of Standard Utilities Corporation and the proceeds distributed to the partnership as a dividend (R. 42-45). On that theory, Standard Utilities Corporation would realize sufficient earnings, as a result of the sale of the stock,

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[1] Based on $7,750,000 in cash and $15,000,000 face amount in notes having a value of $14,100,000 (R. 33).

together with the accumulated earnings available at the time, in order that the entire value of the distribution would be paid out of earnings and profits accumulated after February 28, 1913. In that event, the entire distribution would be taxable as an ordinary dividend.

This theory of the case was not agreed to by Judge Whitaker and Judge Littleton, the other two members of the Court of Claims who participated in the decision. Both concluded that the declaration of the dividend by Standard Utilities Corporation and the sale of the stock by the partnership should be treated as separate transactions for federal tax purposes (R. 47-48; R. 50). On that theory, the sale of the stock would not give rise to any additional earnings available for distribution by Standard Utilities Corporation as a taxable dividend. However, Judge Whitaker held that, since the dividend stock was presumably purchased by Standard Utilities Corporation out of earnings and profits, and the accumulated earnings and profits as of the date of distribution exceeded the cost of that stock, it was immaterial that the value of the distribution exceeded the earnings and profits accumulated after February 28, 1913. The full value of the distribution was, nevertheless, taxable as a dividend within the meaning of section 115(a) of the Revenue Act of 1928. Therefore, he concurred in the result arrived at by Judges Madden and Jones (R. 48-50).

As a result of the foregoing, judgment was entered in this proceeding pursuant to an opinion by Judges Madden and Jones, which was contrary to the views of the other two members of the Court of Claims who participated in the decision, and an opinion by Judge Whitaker, which was contrary to the views of the other three members of that court. There was no basis for a decsion which was agreed to by any three members of the Court of Claims.

Statutes and Regulations Involved

The pertinent statutes and regulations will be found in an Appendix.

Question Presented

Whether the Court of Claims erred as a matter of law in deciding that petitioner's entire distributive share of the proceeds from the sale of 150,000 shares of stock of Standard Power & Light Corporation was taxable as an ordinary dividend within the meaning of section 115(a) of the Revenue Act of 1928.

Reasons Relied on for the Allowance of the Writ

I. The opinion of Judge Madden, concurred in by Judge Jones, with respect to the legal effect of the distribution and sale of the Standard Power & Light Corporation stock, is in conflict with other decisions of the courts of the United States and of the Tax Court. Some of these decisions are:

Howell Turpentine Company v. *Commissioner*, 162 F. (2d) 319 (C.C.A. 5th);

United States v. *Cummins Distilleries Corporation*, — F. (2d) — (C.C.A. 6th), decided February 6, 1948;

Baum v. *Dallman*, — F. Supp. — (Dist. Ct., So. Dist., Ill.) decided February 24, 1948;

See also: *Fairfield Steamship Corporation* v. *Commissioner*, 157 F. (2d) 321 (C.C.A. 2nd).

The opinion of Judge Madden on this question is likewise in conflict with the opinion of Judge Whitaker and the opinion of Judge Littleton, who participated in the decision below.

II. The construction of section 115(a) of the Revenue Act of 1928, as set forth in the opinion of Judge Whitaker, is in conflict with other decisions of the courts of the

United States and of the Tax Court. Some of these decisions are:

Commissioner v. *Timken*, 141 F. (2d) 625 (C.C.A. 6th);
V. U. Young, 5 T.C. 1251;
Transport, Trading & Terminal Corporation, 9 T.C. 247 (on appeal C.C.A. 2nd);
Paulina duPont Dean, 9 T.C. 256 (on appeal C.C.A. 3rd);
Estate of John H. Acheson, T.C. Memo., Dk. Nos. 2712, et al., November 25, 1944;
Howard C. Platt Trust, T.C. Memo., Dk. Nos. 2248, et al., June 25, 1945;
Herbert G. Hanan, T.C. Memo., Dk. No. 1539, July 7, 1944;
Henry S. McKee, T.C. Memo., Dk. No. 112400, July 15, 1944;
Beach Petroleum Corp., Ltd., T.C. Memo., Dk. No. 3273, July 26, 1946.

The opinion of Judge Whitaker on this question is likewise in conflict with the opinion of Judge Madden, concurred in by Judge Jones, and the opinion of Judge Littleton, who participated in the decision below.

III. The questions involved in the opinions of both Judge Madden and of Judge Whitaker are important in the administration of the Internal Revenue laws and should be passed upon by this Court.

The opinion of Judge Madden represents an unwarranted extension of the decision of this Court in *Commissioner* v. *Court Holding Company*, 324 U.S. 331, which the Commissioner of Internal Revenue is presently urging the lower courts to adopt. The decision of the Court of Claims in this proceeding (and of only two judges of that court)

is in conflict with other decisions. The question warrants clarification by this Court.[2]

The proper construction of section 115(a), involving the determination of the earnings and profits of a corporation available for distribution as a taxable dividend and the effect of a distribution of property in kind, is even more important in the administration of the Internal Revenue laws. The Commissioner of Internal Revenue is seeking to overrule the decision of this Court in *General Utilities & Operating Company* v. *Helvering*, 296 U. S. 200. The fact that, pending the consideration of this question by the court below, there have been numerous decisions on the same question in the Tax Court, is ample evidence of the extent to which this issue is presently in controversy.

IV. The question whether there exists a *quorum* of the judges of the Court of Claims, as required for a decision pursuant to section 138 of the Judicial Code (Sec. 138, Act of March 3, 1911, 36 Stat. 1136), under the circumstances of this case, should be decided by the Supreme Court for the guidance of that court.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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[2] Magill, Roswell, Sales of Corporate Stock or Assets, *Columbia Law Review*, Vol. 47, No. 5, pp. 707, 713.

BRIEF IN SUPPORT OF THE PETITION

Opinion Below

The opinion of the Court of Claims is reported at 119 F. Supp. 72.

Jurisdiction

The judgment of the Court of Claims was entered on December 1, 1947. The time for filing this petition was extended to March 31, 1948. The jurisdiction of this Court is invoked under section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement of Facts

A statement of the facts and question involved will be found in the petition.

Statutes and Regulations Involved

The pertinent statutes and regulations will be found in an Appendix.

ARGUMENT

The Court of Claims erred as a matter of law in holding that the petitioner's entire distributive share of the proceeds from the sale of 150,000 shares of stock of Standard Power & Light Corporation was taxable as an ordinary dividend within the meaning of Section 115(a) of the Revenue Act of 1928.

I. *With Respect to the Issues Involved, the Decision of the Court of Claims Is Not Based Upon a Decision By a Quorum of the Court of Claims.*

On January 7, 1930, Standard Utilities Corporation made a distribution in kind consisting of 150,000 shares of Stand-

ard Power & Light Corporation stock for the purpose of enabling its stockholders to make a sale thereof. Thereafter on the same day, there were sold for the account of Standard Utilities Corporation an additional 15,000 shares of the stock. No part of the distribution was attributable to an increase in value of property accrued before March 1, 1913.

A *quorum* of the Court of Claims, consisting of Judge Madden, with Judge Jones concurring, and of Judge Littleton, concluded that the distribution was taxable as a dividend only to the extent that there were earnings and profits of Standard Utilities Corporation accumulated after February 28, 1913. Judge Whitaker alone failed to concur in this respect. By reason of this decision, it then became necessary for the Court of Claims to decide whether any additional earnings and profits were realized as a result of the distribution and sale of the Standard Power & Light stock.

Judge Madden, with Judge Jones concurring, held that the distribution of the dividend stock by Standard Utilities Corporation and the sale of that stock by the partnership should be disregarded, as separate transactions, for federal tax purposes. The transactions should thus be treated as a sale of the stock by Standard Utilities Corporation and a distribution of the proceeds to the partnership. The earnings and profits of Standard Utilities Corporation would be increased by the gain realized on the sale. There would thus be additional earnings and profits which would exceed the amount of the distribution and the entire distribution would be taxable under section 115(a) of the Revenue Act of 1928.

Judge Whitaker and Judge Littleton, each in separate opinions, disagreed with that theory of the case. Therefore, there was no determination by a *quorum* of the judges

of the Court of Claims that any additional earnings and profits were realized as a result of the distribution and sale of the dividend stock. In the absence of such determination, the distribution was only taxable, in the opinion of Judges Madden, Jones and Littleton, to the extent that there were accumulated earnings and profits, *i.e.*, $4,361,964.25. The result of the decision, as a whole, was contrary to the intendment of section 138 of the Judicial Code.

II. *The Opinion of Judge Madden with Respect to the Legal Effect of the Transactions Involving the Standard Power & Light Corporation Stock Is Based Upon an Erroneous Interpretation of the Supreme Court's Decision in the Court Holding Company Case.*

Judge Madden held that the sale of the 150,000 shares of Standard Power & Light Corporation stock must be treated as a sale by Standard Utilities Corporation for federal tax purposes. His opinion was based upon the proposition that the intervening dividend *must be disregarded* for tax purposes. It is stated that this is required by this Court's decision in *Commissioner* v. *Court Holding Company* (324 U. S. 331), which reversed the decision of the Circuit Court of Appeals for the Fifth Circuit (143 F. (2d) 823) and affirmed the decision of the Tax Court (2 T. C. 531).

It has always been recognized that taxpayers have the right to shape their transactions in such a manner as to minimize the resulting federal tax liability. This right was reaffirmed in *Gregory* v. *Helvering*, 293 U. S. 465. In that case, however, the taxpayer sought to bring an otherwise taxable transaction within the non-recognition of gain provisions of section 112 of the Revenue Act of 1928. This Court held that in order to qualify within those provisions, there must be a real corporate reorganization having some business purpose. In the absence of such, the Court held

that the separate steps adopted by the taxpayer should be disregarded. The transaction did not meet the requirements of a "reorganization".

Basically, the question is whether this Court's decision in the *Court Holding Company* case, *supra*, follows the line of cases exemplified by *Gregory* v. *Helvering, supra*, or whether that decision follows the line of cases exemplified by *Dobson* v. *Commissioner*, 320 U. S. 489. In the present case, Judge Madden in effect held that the *Court Holding Company* case, *supra*, followed the line of *Gregory* v. *Helvering, supra*. However, there is a fundamental distinction in that we are not concerned with any non-recognition of gain provisions of the revenue laws. The parties adopted a course of action which involved (1) a taxable corporate distribution and (2) a taxable sale of the property received by the shareholders pursuant to that distribution. Neither transaction qualified as a non-taxable transaction under the revenue laws. Thus, we contend that it is solely a question whether there was, in fact, a distribution by the corporation followed by the sale of the property by the shareholders, or whether there was, in fact, a sale of the property by the corporation followed by a distribution of the proceeds to the shareholders. It was stipulated in this case that the sale of the dividend stock was, in fact, contracted for and consummated by the stockholders.

In the *Court Holding Company* case, *supra*, the Tax Court found that there was an oral agreement to sell the property entered into on behalf of the corporation, and that the sale was in reality made pursuant to that agreement. Therefore, the profit resulting from the sale was income of the corporation. The decision was reversed by the Circuit Court of Appeals for the Fifth Circuit, with Judge Hutcheson dissenting. In reversing, the majority held that the corporation had the right to, and did, refuse to complete

the sale. Therefore, the corporation was not taxable on the resulting gain. Judge Hutcheson, dissenting, agreed that this might have been done. However, he concluded that the Tax Court had found, as a fact, that this was not done. Therefore, under the rule of *Dobson* v. *Commissioner, supra,* he was of the opinion that the Circuit Court was bound by that finding. The Supreme Court reversed the decision of the majority and affirmed the decision of the Tax Court *on that basis.* It is thus our position that the decision in the *Court Holding Company* case, *supra,* should be interpreted as turning upon a question of fact, with respect to which the initial decision of the Tax Court was controlling.

This interpretation of the decision in the *Court Holding Company* case, *supra,* has generally been accepted in the subsequent cases in which the question has arisen, as well as by two of the judges of the Court of Claims who participated in the decision below. Some of those cases are:

Howell Turpentine Company v. *Commissioner,* 162 F. (2d) 319 (C. C. A. 5th);

United States v. *Cummins Distilleries Corporation,* — F. (2d) — (C. C. A. 6th), decided February 6, 1948;

Baum v. *Dallman,* —F. Supp. — (Dist. Ct., So. Dist., Ill.) decided February 24, 1948;

See also: *Fairfield Steamship Corporation* v. *Commissioner,* 157 F. (2d) 321 (C. C. A. 2nd).

The correctness of this view is best exemplified in *Howell Turpentine Company* v. *Commissioner, supra.* A majority of the Tax Court there were of the opinion that the *Court Holding Company* case, *supra,* required a holding that a sale, which had in fact been made by the stockholders, should be attributed to the corporation. This was reversed by the Circuit Court of Appeals for the Fifth Circuit on the grounds that the decision of the majority of the Tax Court

was erroneous, as a matter of law, in its interpretation of the *Court Holding Company* case, *supra.* In reversing, Circuit Judge Hutcheson, whose dissent had been sustained in the *Court Holding Company* case, *supra,* was in agreement with the Circuit Court's decision in the *Howell Turpentine Company* case, *supra.*

III. *The Concurring Opinion of Judge Whitaker Is Based Upon an Erroneous Interpretation of Section 115(a) of the Revenue Act of 1928 and of Regulations 74, Article 627.*

The plaintiff below and the Government stipulated the facts upon the basis of which the Court of Claims might determine the amount of the distribution, whether in stock or the proceeds from the sale thereof, which was taxable as a dividend upon section 115(a) of the Revenue Act of 1928. Both sides agreed that the amount taxable as a dividend could not exceed the earnings and profits accumulated after February 28, 1913. The Government, in effect, conceded that if the distribution in kind was recognized for tax purposes, the amount taxable as a dividend was limited to the earnings and profits accumulated from other sources. This was the basis for the Commissioner's original determination allowing a partial refund. However, in a concurring opinion Judge Whitaker alone adopts a different view. For his opinion, he relies upon Article 627 of Regulations 74 and the cases of *Commissioner* v. *Wakefield,* 139 F. (2d) 280 (C. C. A. 6th) and *Commissioner* v. *Young Corporation,* 103 F. (2d) 137 (C. C. A. 3rd).

Article 627 of Regulations 74 refers to a rule of valuation rather than to the taxability of the distribution. Obviously, if there were no earnings and profits available for distribution as a taxable dividend, a dividend in kind would be wholly non-taxable under section 115(a) of the Revenue Act

of 1928. The dividend is includible in gross income, or taxable under another provision of the revenue laws in the case of a capital gain, to the extent of the fair market value of the property received.

In *Commissioner* v. *Wakefield, supra,* a corporation distributed stock of another corporation as a dividend in kind. The recipients treated the distribution as a return of capital to the extent that it exceeded the earnings and profits of the distributing corporation. The Circuit Court of Appeals for the Sixth Circuit held that the full amount of the distribution was taxable as a dividend on the theory that the stock distributed was purchased out of earnings and profits. The Revenue Act of 1936 was controlling. The court relied on section 115(j). There was no corresponding provision in the Revenue Act of 1928.

There have been numerous cases involving distributions in kind decided subsequent to the *Wakefield* case, *supra.* The contention that the taxability of a distribution of property is governed by whether the property was originally purchased out of earnings has been uniformly rejected by the courts. This contention has never even been asserted by the Commissioner here. The rule, uniformly followed by the courts, is that a distribution in kind is taxable as a dividend only to the extent that there were statutory earnings and profits available at the time of the distribution. In order to eliminate any question, the Congress has attempted to define more specifically the phrase "earnings or profits". (See Internal Revenue Code, Sec. 115(l) and(m).) This was held merely to be declaratory of existing law. (*Commissioner* v. *Fisher,* 327 U. S. 512) The opinion of Judge Whitaker, if corect, would have required a different decision in substantially all of the cases dealing with distributions in kind. Some of those cases are:

Commissioner v. *Timken,* 141 F. (2d) 625 (C. C. A. 6th);

V. U. Young, 5 T. C. 1251;

Transport, Trading & Terminal Corporation, 9 T. C. 247 (on appeal C. C. A. 2nd);

Paulina duPont Dean, 9 T. C. 256 (on appeal C. C. A. 3rd);

Estate of John H. Acheson, T. C. Memo., Dk. Nos. 2712, et al., November 25, 1944;

Howard C. Platt Trust, T. C. Memo., Dk. Nos. 2248, et al., June 25, 1945;

Herbert G. Hanan, T. C. Memo., Dk. No. 1539, July 7, 1944;

Henry S. McKee, T. C. Memo., Dk. No. 112400, July 15, 1944;

Beach Petroleum Corp., Ltd., T. C. Memo., Dk. No. 3273, July 26, 1946.

The principles which are applicable here were recently restated by the Tax Court in *Paulina duPont Dean, supra*, promulgated August 29, 1947. The court there said:

> "To constitute a dividend there must be a distribution of earnings and profits. *Palmer v. Commissioner*, 302 U. S. 63. The earnings and profits of a corporation, the distribution of which results in a taxable dividend, are a statutory concept. They are not to be determined exclusively by reference to corporate accounting standards. *John T. Wilson*, 31 B. T. A. 1022; *Susan T. Freshman*, 33 B. T. A. 394. We have consistently applied the rule that a distribution in kind of stock which had appreciated in value did not result in taxable income to the corporation. Estate of *H. H. Timken*, 47 B. T. A. 494; affd., 141 Fed. (2d) 625; *National Carbon Co.*, 2 T. C. 57; *V. U. Young*, 5 T. C. 1251; cf. *R. D. Merrill Co.*, 4 T. C. 955. In the latter case we held that earnings and profits could not be decreased by the depreciation in value of securities. In *La Belle Iron Works v. United States*, 256 U. S. 377, it was held that the appreciated value of corporate property could not be treated as part of the corporate surplus and profits for the purpose of increasing its

invested capital. In *V. U. Young, supra,* respondent, in connection with the distribution of Theatrical Managers, Inc., stock by Gary Theatre Co. to its stockholders, made the same contention, at least in principle, as that made here. We rejected that theory there and held that the distribution in kind could not be and was not a taxable dividend except to the extent of the corporate earnings and profits, when distributed, without including the increase in value of the corporate assets. * * *

"Nor do we find any merit in the respondent's alternative positions. He argues that certain of the securities distributed in kind were purchased prior to the taxable year at a time when Nemours had earnings and profits accumulated after March 1, 1913, in amounts in excess of the cost of such shares. A similar argument was made by respondent in the recent case of *Jane Easton Bradley,* 9 T. C. 115. We there held that such fact is immaterial and not determinative. Only to the extent that earnings and profits are available for distribution in the taxable year—and determined without including any increment in the value of the distributed assets—can there be a taxable dividend. *V. U. Young, supra; Jane Easton Bradley, supra; Estate of H. H. Timken, supra; R. D. Merrill Co., supra.* * * *" (p. 265).

There can be no question but that the opinion of Judge Whitaker, *with which none of the other judges agreed,* is directly in conflict with the principles thus enunciated.

Conclusion

The decision of the Court of Claims with respect to the transactions involving the Standard Power & Light Corporation stock is erroneous, as a matter of law, in that the ultimate decision is based upon separate opinions by Judge Madden (concurred in by Judge Jones) and by Judge Whitaker. In each opinion, there was involved a separate and distinct

issue upon which a decision was necessary in order that the ultimate decision of the Court of Claims might be sustained. Neither decision with respect to such issues was concurred in by a *quorum* of the Court of Claims. Furthermore, the separate opinions of Judge Madden and of Judge Whitaker on those issues are likewise erroneous as a matter of law. The dissenting opinion of Judge Littleton represents the correct view on those issues.

Respectfully submitted,

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APPENDIX

Statutes and Regulations Involved

Revenue Act of 1928, 45 Stat. 791:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of a dividend.*—The term "dividend" when used in this title (except in section 203(a)(4) and section 208(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

* * * * * * *

(d) *Other distributions from capital.*—If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of such distribution shall be applied against and reduce the basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. The provisions of this subsection shall also apply to distributions from depletion reserves based on the discovery value of mines (p. 822).

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and

the total tax shall be this amount plus 12½ per centum of the capital net gain (p. 811).

Act of March 3, 1911, 36 Stat. 1087:

SEC. 138. The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided,* That the concurrence of three judges shall be necessary to the decision of any case (p. 1136).

Treasury Regulations 74 (December 1, 1931):

ART. 627. *Dividends paid in property.*—Dividends paid in securities or other property (other than its own stock) in which the earnings of a corporation have been invested, are income to the recipients to the amount of the market value of such property when receivable by the shareholders. (See, however, section 112 (h) and article 576.) Where a corporation declares a dividend payable in stock of another corporation, setting aside the stock to be so distributed and notifying the shareholders of its action, the income arising to the recipients of such stock is its market value at the time the dividend becomes payable. (See article 333.) Scrip dividends are subject to tax in the year in which the warrants are issued.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 696

BENJAMIN GUINNESS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 40-52) is reported at 73 F. Supp. 119.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947. (R. 53.) The time for filing a petition for certiorari was extended on taxpayer's motion to March 31, 1948. (R. 54.) The petition was filed March 25, 1948. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether taxpayer's entire distributive share of the proceeds from the sale of 150,000 shares of the stock of Standard Power & Light Corporation on January 7, 1930, was taxable to him as an ordinary dividend under the provisions of Section 115(a) of the Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 16-17.

STATEMENT

The facts relating to the single issue presented to this Court may be summarized as follows:

Taxpayer was, at all times material, an individual subject of Great Britain, residing in France. During the calendar year 1929 and prior thereto, at least from July 1, 1925, he was a partner of Ladenburg, Thalmann & Company, an investment banking partnership with its principal office in New York City, New York. Taxpayer's interest in the partnership was, at all times mentioned, 21.345 percent. (R. 22, 34, 35.)

On December 8, 1929, taxpayer served notice upon the other partners of his intention to withdraw from the partnership as of December 31, 1929. Following extended negotiations, taxpayer's withdrawal became effective with the signing of an agreement for settlement of his interest in the assets of the continuing partnership on April 22, 1930. (R. 22-25.)

On August 6, 1931, taxpayer filed his federal income tax return for the calendar year 1930 disclosing ordinary net income in the amount of $4,263,853.94, a capital net loss of $17,615.77 and a tax liability of $842,160.20. That amount, together with interest of $1,765.08 on the first installment, was paid in quarterly installments prior to March 17, 1932.

There was included in the return, as dividends received by taxpayer, an amount of $4,746,441.57. The latter amount represented the correct value of taxpayer's interest in a distribution made January 7, 1930, being 21.345 percent of the total distribution. The facts underlying the distribution appear hereinafter. (R. 25-26.)

On June 19, 1925, Ladenburg, Thalmann & Company, hereinafter called the partnership, held 71,925 shares of stock of Pittsburgh Utilities Corporation which had been acquired at a cost of $959,311.75. On July 1, 1925, the partnership organized the Criterion Corporation, and exchanged the 71,925 shares of Pittsburgh Utilities Corporation stock for the entire capital stock of the Criterion Corporation. On the same day, the partnership also organized the Standard Utilities Corporation, and exchanged all the stock of the Criterion Corporation for all the stock of the Standard Utilities Corporation. On July 8, 1925, the partnership organized the Universal Utilities Corporation and subscribed for its entire capital stock for $400,000 in cash. On the same day the Standard Utilities Corporation transferred the entire capital stock of the Criterion Corporation to Universal Utilities Corporation for $400,000 in cash, and $4,700,000 in notes of the Universal Utilities Corporation. Also, on the same day, the Universal Utilities Corporation liquidated the Criterion Corporation, thereby receiving the 71,925 shares of Pittsburgh Utilities Corporation stock. From July 1, 1925, and at all times herein material, the partnership owned all of the stock of Standard Utilities Corporation. (R. 26.)

On July 8, 1925, Standard Utilities Corporation bought 15,000 shares of common stock of Standard Power & Light Corporation for $15,000 cash. On the next day, Universal Utilities Corporation sold the 71,925 shares of Pittsburgh Utilities Corporation stock for $2,094,087.28 in cash, and 150,000 shares of common stock of Standard Power & Light

Corporation of a fair market value of $3,010,000. Also, on July 9, 1925, Universal Utilities Corporation paid its notes to Standard Utilities Corporation in the amount of $4,700,000 with $1,690,000 in cash, and the 150,000 shares of Standard Power & Light Corporation stock. While the 15,000 shares of Standard Power & Light Corporation stock and the 150,000 shares of stock of the same corporation were not of the same class at the time of acquisition, the certificate of incorporation of Standard Power & Light Corporation was amended on May 4, 1926, to reclassify the stock into a single class known as common stock of that corporation, share for share, although no new certificates were issued for the stock mentioned until January 6, 1930. For convenience all of the stock will be referred to as common stock of Standard Power & Light Corporation without regard to its classification when acquired. The series of transactions above outlined fixed the "basis" of the Standard Power & Light Corporation common stock in the hands of Standard Utilities Corporation for determining the gain which arose from its sale on January 7, 1930. The agreed facts with respect to the results which flowed from the sale on January 7, 1930, appear hereinafter. (R. 26-27.)

On July 9, 1925, H. M. Byllesby & Company and/or Standard Gas & Electric Company owned the same number of shares of stock of Standard Power & Light Corporation as did Standard Utilities Corporation, namely 165,000 shares. On that date the partnership, representing the Standard Utilities Corporation, which owned 165,000 shares of the Standard Power & Light Corporation stock, and H. M. Byllesby & Company and/or Standard Gas & Electric Company, as owner of a like number of shares, deposited the 330,000 shares of stock in escrow with the Chemical National Bank of New York (which afterwards became the Chemical Bank & Trust Company) by an agreement prohibiting any party to the agreement from disposing of the escrowed stock

except by consent of the other parties. In order to permit certain exchanges, not material here, the escrow agreement of July 9, 1925, was dissolved on March 23, 1926, and a new agreement was entered into on April 23, 1926, by which the 330,000 shares of escrowed stock remained in escrow under substantially the same conditions with the Chemical National Bank of New York. (R. 27.)

On December 21, 1929, the partnership, H. M. Byllesby & Company, and United States Electric Power Corporation entered into a tripartite agreement under which the partnership agreed to sell, and United States Electric Power Corporation agreed to buy, the 165,000 shares of common stock of Standard Power & Light Corporation, owned by Standard Utilities Corporation, for $10,000,000 in cash and $15,000,000 in notes of the purchaser. The agreement provided that the sale should take place on January 2, 1930, if certain minor preliminaries had been taken care of by that time, but in any case before January 28, 1930. At the time of the execution of the agreement of sale, the partnership did not own any of the common stock of Standard Power & Light Corporation. However, as heretofore shown, Standard Utilities Corporation owned the 165,000 shares of the stock in question which had remained in escrow under the escrow agreement heretofore referred to, and the partnership owned all of the stock of Standard Utilities Corporation. (R. 27-28.)

On December 31, 1929, Standard Gas & Electric Company, H. M. Byllesby & Company, and the partnership delivered to the Chemical Bank & Trust Company a letter terminating the escrow agreement of April 23, 1926, in the event the sale of the 165,000 shares of common stock of Standard Power & Light Corporation (owned by Standard Utilities Corporation) was consummated pursuant to the agreement of December 21, 1929. (R. 28.)

On January 6, 1930, the Chemical Bank & Trust Com-

pany still held the certificates of the common stock of Standard Power & Light Corporation which had been in escrow, and on that date it was irrevocably instructed by the partnership to deliver a certificate for 165,000 shares of the reclassified stock to United States Electric Power Corporation upon receipt of the payment provided for by the contract of December 21, 1929, and the compliance by the parties concerned with the form commitments made in the contract. On the same day the United States Electric Power Corporation deposited with the Chemical Bank & Trust Company $10,000,000 in cash and its four promissory notes, each of a face value of $3,750,000, made to the order of the partnership. The United States Electric Power Corporation also irrevocably instructed the Chemical Bank & Trust Company to deliver the cash and notes to the order of the partnership in exchange for the certificate for 165,000 shares of the stock of Standard Power & Light Corporation. The above instructions were accepted by the Chemical Bank & Trust Company, and, simultaneously, arrangements were made for the bank to send a representative to Dover, Delaware, on the following day with the 165,000 shares of common stock of Standard Power & Light Corporation, the official check of the bank payable to the partnership, and the notes of the United States Electric Power Company. (R. 28-31.)

The stockholders of Standard Gas & Electric Company convened in Dover, Delaware, on January 7, 1930, at 9:30 a.m., and adopted the resolutions contemplated by the contract of December 21, 1929. The stockholders of Standard Power & Light Corporation met in Dover, Delaware, at 12:30 p.m., January 7, 1930, and adopted the minor amendments to its charter and the other resolutions contemplated by the agreement of December 21, 1929. The board of directors of Standard Gas & Electric Company convened in Dover, Delaware, at 1:30 p.m. on January 7, 1930,

and approved the proceedings of its stockholders in their earlier meeting. (R. 31.)

The board of directors of Standard Utilities Corporation convened in New York City on January 7, 1930, at 1:30 p.m., and adopted the following resolution (R. 32):

> Resolved, that Ladenburg, Thalmann & Co., for and on behalf of Standard Utilities Corporation, and without the necessity of disclosing Standard Utilities Corporation as the principal for whom they are acting be and they hereby are authorized on behalf of Standard Utilities Corporation, to negotiate and consummate a sale of Fifteen Thousand (15,000) shares of Common Stock of Standard Power and Light Corporation at the price of One Hundred Fifty Dollars ($150) per share and to cause certificates therefor to be delivered to the purchaser thereof and, upon receipt of the purchase price therefor in cash, to hold the same to the credit of this corporation and subject to the order of its officers;
>
> Resolved, that One Hundred Fifty Thousand (150,000) shares of Common Stock of Standard Power and Light Corporation be and they hereby are declared to be paid as a dividend upon all the outstanding shares of stock of this Corporation of each class, share and share alike, payable immediately to the holders of record thereof.

At the close of the meeting Walter T. Rosen, chairman of the board of directors of Standard Utilities Corporation and a member of the partnership, informed Moritz Rosenthal, president of Standard Utilities Corporation and also a member of the partnership, who was at Dover, Delaware, of the adoption of the foregoing resolutions and the transfer of 150,000 shares of the stock of Standard Power & Light Corporation to the partnership. (R. 32-33).

Thereafter, on January 7, 1930, the preliminaries required by the contract of December 21, 1929, having been complied with, Mr. Rosenthal caused the single certificate

for the 165,000 shares of the reclassified common stock of Standard Power & Light Corporation to be transferred on its books to the United States Electric Power Corporation. At the direction of the president of the United States Electric Power Corporation, the representative of the Chemical Bank & Trust Company thereupon delivered to Mr. Rosenthal the official check of the bank for $10,000,000 and the four promissory notes of the United States Electric Power Corporation in the aggregate amount $15,000,000, in payment for the 165,000 shares of common stock of Standard Power & Light Corporation. Check and notes were made payable to the partnership. The notes had a cash value on January 7, 1930, of $14,100,000. (R. 33.)

On January 1, 1930, the earnings and profits of Standard Utilities Corporation, accumulated after February 28, 1913, amounted to $4,358,861.29, and taxpayer's ratable share thereof was $930,398.94. The gain realized by Standard Utilities Corporation from the sale on January 7, 1930, of 15,000 shares of the stock of Standard Power & Light Corporation, was $1,949,400. Earnings from other sources from January 1 to January 7, 1930, inclusive, were $3,102.96. If the sale of the remaining 150,000 shares of stock of Standard Power & Light Corporation on January 7, 1930, is treated as a sale by or on behalf of Standard Utilities Corporation, the amount by which the consideration received for such stock in that sale exceeded the cost of such stock to Standard Utilities Corporation was $19,226,753.61. The stock of Standard Utilities Corporation was continuously owned by the partnership after July 8, 1925. Taxpayer was a member of the partnership during the entire period from July 8, 1925, to December 31, 1929, inclusive, and his ratable interest in the stock of Standard Utilities Corporation, as a member of the partnership, remained the same throughout, namely 21.345 percent of the total stock outstanding. (R. 34.)

On December 12, 1932, taxpayer filed a claim for refund of $277,163.53 for the calendar year 1930 on the ground that the distribution made to him by Standard Utilities Corporation on January 7, 1930, and heretofore described in connection with the sale of 165,000 shares of stock of Standard Power & Light Corporation, which taxpayer had included in his return as dividends in the amount of $4,746,-441.57, was taxable as ordinary income only to the extent of $44,237.16, for the reason that taxpayer's share of the accumulated earnings and profits of Standard Utilities Corporation available for distribution on that date was not in excess of that amount. The claim urged that the excess of the distribution represented only a capital gain to taxpayer and, as such, was taxable at 12½ per cent under the provisions of Section 101 of the Revenue Act of 1928. (R. 37.)

On June 19, 1933, the Commissioner of Internal Revenue advised taxpayer that the claim for refund would be allowed in part and disallowed in part by the issuance of a certificate of overassessment in the amount of $19,611.28. The overassessment resulted in part from the Commissioner's treatment of taxpayer's share of the distribution by Standard Utilities Corporation on January 7, 1930, as partly in excess of the earnings available to Standard Utilities Corporation for distribution as dividends without considering any profit to the corporation from the sale of the 150,000 shares of stock of Standard Power & Light Corporation on January 7, 1930. Other major adjustments not here involved minimized the overassessment determined. (R. 37-38.)

On August 14, 1933, taxpayer filed a second claim for refund in which he challenged the Commissioner's action in adjusting items of income other than those concerned with the dividend distribution of Standard Power & Light Corporation stock on January 7, 1930. (R. 38.)

On May 11, 1935, the Commissioner advised taxpayer of rejection of his second claim for refund, although conceding certain issues raised in the claims other than those involving the distribution received by taxpayer on January 7, 1930. The Commissioner, however, held that the Standard Utilities Corporation had in substance sold the entire 165,000 shares of Standard Power & Light Corporation stock to United States Electric Power Corporation on January 7, 1930, and that the final recomputation of taxpayer's income tax liability for 1930 disclosed a deficiency of income tax barred from assessment by operation of the applicable statute of limitations. (R. 39.)

ARGUMENT

On January 7, 1930, taxpayer received a distribution of $4,746,441.57 from Standard Utilities Corporation, a corporation whose stock was wholly owned by the investment banking partnership of which taxpayer was a participating member. The amount received by taxpayer on January 7, 1930, represented his proportionate interest in the sales price of 165,000 shares of the stock of Standard Power & Light Corporation, long owned by Standard Utilities Corporation but disposed of on that date under the circumstances set out in the foregoing statement. If the stock was actually sold by or for Standard Utilities Corporation, and the proceeds were distributed to the latter's stockholders, the taxpayer admittedly received a fully taxable ordinary dividend.

The court below concluded, in an opinion written by Judge Madden, that the sale was negotiated and effected by the partnership on behalf of the Standard Utilities Corporation. As a fact the court found that the corporation realized $21,176,153.61 profit on the sale. (R. 34.) The dividend to the taxpayer (through the partnership) was thus a distribution of the proceeds of the sale and, being

made wholly from profits, is taxable as ordinary income to the taxpayer.

In a concurring opinion (R. 46-50), Judge Whitaker reached the same result based, however, on the view that taxpayer had received his proportionate share of 150,000 shares of the stock of Standard Power & Light Corporation in kind, and had immediately sold it. Judge Whitaker's reasoning was, in summary, as follows (R. 49): the earnings and profits of Standard Utilities Corporation available for distribution to stockholders on January 7, 1930, from sources other than the sale of the 150,000 shares of Standard Power & Light Corporation stock, totaled $4,361,963.25; since standard Utilities Corporation's cost basis of the shares was $3,010,000, the corporation had sufficient earnings available to cover the entire distribution made in kind on January 7, 1930, and, therefore, the distribution made to taxpayer was fully taxable under Section 115(a) and (b) of the Revenue Act of 1928 (Appendix, *infra*). The theory upon which this concurring opinion is predicated was not urged in the court below, but appears to be supported generally by *Commissioner* v. *Wakefield,* 139 F. 2d 280 (C.C.A. 6); *Commissioner* v. *F. J. Young Corp.,* 103 F. 2d 137 (C.C.A. 3); *Binzel* v. *Commissioner,* 75 F. 2d 989 (C.C.A. 2), certiorari denied, 296 U. S. 579. See, however, *Dean* v. *Commissioner,* 9 T.C. 256, pending on appeal (C.C.A. 3).

The petitioner urges that, because of the different grounds relied on by Judge Madden in the majority opinion and Judge Whitaker in his concurring opinion, the decision of the Court is not supported by the required quorum of three judges even though they reached the same result in dismissing his suit for refund. See Section 138 of the Judicial Code (28 U.S.C. 243).

The ultimate question, however, presented to the court below, as in all tax refund suits, was whether taxpayer was entitled to recover any part of his individual income taxes

paid for the calendar year 1930. See *Lewis* v. *Reynolds*, 284 U. S. 281; *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357. The Court of Claims, with only Judge Littleton dissenting, held that petitioner was not entitled to recover. The statute manifestly does not require the concurrence of any of the three judges in the reasons for a decision, or the grounds upon which the decision is based. The reasons or ground relied upon by the judges of the lower court are not particularly material, if the result is correct. Cf. *Helvering* v. *Gowran*, 302 U. S. 238, 245, 246. Since three of the four judges, who considered the taxpayers' claim in the court below, concurred in the decision that taxpayer was not entitled to recover, and in the dismissal of his suit (R. 52-53), the statutory requirements are plainly met.

The facts in this case bring it squarely within the scope of *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, reversing 143 F. 2d 823 (C.C.A. 5th), and affirming 2 T.C. 531. In that case the Tax Court found as facts (pp. 537-538) that when the negotiations for sale of the assets involved were completed, and the price, time, terms of sale, etc., were agreed upon, the corporation owned the assets; that there was no plan shown for liquidation of the corporation at the time; that the corporation's officers subsequently presented themselves to the purchaser to settle and execute the terms of the earlier agreement; that the corporation's executive officer was acting for the corporation, which later approved his acts; that the conditions, terms of payment, etc., were for the corporation's benefit; that no additional negotiations or re-negotiations with the prospective purchaser occurred after the initial agreement; and that the repudiation of its contract, the dissolution of the corporation, and the transfer of the corporation's assets to the stockholders for the purpose of having them convey the assets to the purchaser were steps in a scheme to make the transaction appear something other than it actually was. The Tax Court

held that the corporation made the sale, and that the transfer of the assets sold to the stockholders for conveyance to the purchaser was simply a matter of form instead of substance, intended only to relieve the corporation of the tax on its profits from the sale. The court further stated that the stockholders were no more than conduits through whom the corporation passed its assets.

In this case, the partnership, as sole stockholder of Standard Utilities Corporation, which, in turn, owned 165,000 shares of Standard Power & Light Corporation stock, entered into a contract for sale of the stock, following careful and exhaustive negotiations. The partnership held itself out not as the owner of the stock but only as the representative or agent of the owner (R. 40). The stock which was the subject of the sale was in escrow at the time the contract of sale was executed. It had been placed there by the partnership under a written contract in which the partnership signed as the representative of the owner, Standard Utilities Corporation. The partnership never owned any of the stock. In the sale contract dated December 21, 1929, the partnership signed as "representing" the owner of 165,000 shares of Standard Power & Light Corporation stock. It did not, however, disclose the principal for which it was acting. In contrast, H. M. Byllesby & Company, and/or Standard Gas & Electric Company, signed both the escrow agreement and the contract of sale as "owner" of the other 165,000 shares of the stock involved.

Every detail of the sale of the Standard Power & Light Corporation stock was worked out in the advance negotiations between the partnership and the prospective purchaser, and even the minutest details were incorporated in the contract of December 21, 1929. That contract was performed exactly as drawn. It was in all respects a sale by the corporation acting through its representative, the partnership. There were no subsequent renegotiations or modi-

fications. The court below noted that the motive in the dividend in kind on January 6, 1930, and the alleged sale of 150,000 of the shares by the individual partners of Ladenburg, Thalmann & Company was to minimize taxes, that is, to enable the Standard Utilities Corporation to avoid taxes on its profits from the sale. (R. 43.) The so-called dividend in kind, of 150,000 of the 165,000 shares sold by the partnership on January 7, 1930, was simply a part of the scheme contrived to accomplish that purpose. It will be noted that the corporation's tax matters are in no way involved in this action.

In the *Court Holding Co.* case, *supra,* this Court said (p. 334):

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

See also *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. C. A. 6); *Embry Realty Co.* v. *Glenn,* 116 F. 2d 682 (C. C. A. 6); *Taylor Oil & Gas Co.* v. *Commissioner,* 47 F. 2d 108 (C. C. A. 5); *Northwest Utilities Securities Corp.* v. *Commissioner,* 67 F. 2d 619 (C. C. A. 8), certiorari denied, 291 U. S. 684; *Tazewell Electric Light & Power Co. v. Strother,* 84 F. 2d 327 (C. C. A. 4).

In this case the partnership of which taxpayer was a participating member, after irrevocably selling the 165,000 shares of Standard Power & Light Corporation stock for

Standard Utilities Corporation, which owned the stock, caused that corporation to authorize it formally to sell for the corporation's benefit 15,000 of the shares at the price and under the terms already agreed upon. The members of the partnership then caused Standard Utilities Corporation to declare a dividend in kind of the other 150,000 shares sold. Both actions were taken at 1:30 p. m. on January 7, 1930, the date of delivery of the entire 165,000 shares to the purchaser. Since the decision below is thus in harmony with this Court's decision in the *Court Holding Company* case, there should be no occasion for this Court to reexamine the decision merely because a different result was reached under different facts in *Howell Turpentine Co.* v. *Commissioner,* 162 F. 2d 319 (C. C. A. 5), and *United States* v. *Cummins Distilleries Corp.,* 166 F. 2d 17 (C. C. A. 6), relied upon by petitioner (Pet. 9). If mere formalism, as shown by the facts of this case, is not to disguise the substance of the transaction, the petition for certiorari should be denied. Cf. *Griffiths* v. *Commisioner,* 308 U. S. 355, 358, and cases cited.

CONCLUSION

The decision below is in accord with this Court's decision in the *Court Holding Co.* case. There is no occasion for further review. The petition should, therefore, be denied.

Respectfully submitted.

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APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

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SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203(a)(4) and section 208(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

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(d) *Other distributions from capital.*—If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of such distribution shall be applied against and reduce the basis of the stock provided in section 113, and if in excess of such basis, such excess shall be

taxable in the same manner as a gain from the sale or exchange of property. The provisions of this subsection shall also apply to distributions from depletion reserves based on the discovery value of mines.

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Judicial Code:

SEC. 138. The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided,* That the concurrence of three judges shall be necessary to the decision of any case. [28 U. S. C. 243.]

Treasury Regulations 74 (1929 ed.):

ART. 627. *Dividends paid in property.*—Dividends paid in securities or other property (other than its own stock) in which the earnings of a corporation have been invested, are income to the recipients to the amount of the market value of such property when receivable by the shareholders. (See, however, section 112 (h) and article 576.) Where a corporation declares a dividend payable in stock of another corporation, setting aside the stock to be so distributed and notifying the shareholders of its action, the income arising to the recipients of such stock is its market value at the time the dividend becomes payable. (See article 333.) Scrip dividends are subject to tax in the year in which the warrants are issued.

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